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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 249

LIVINGSTON H. MCCREA, PETITIONER

v.

THE UNITED STATES, AS OWNER OF THE STEAMSHIP "American Shipper", Engines, Tackle, Apparatus, Etc.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The first opinion of the District Court is reported in 3 F. Supp. 184. The opinion of the District Court upon rehearing is reported in 3 F. Supp. 187. The opinion of the Circuit Court of Appeals is reported in 70 F. (2d) 632.

JURISDICTION

The judgment of the court below was entered May 7, 1934 (R. 221). The petition for a writ of certiorari was filed August 3, 1934. The jurisdic-

tion of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the United States is liable under Section 3 of the Seaman's Act of 1915 for double wages during the period of delay in payment of a seaman's wages.

2. Whether the petitioner, who left the ship on which he was employed as a seaman because of the respondent's violation of Section 2 of the Seaman's Act of 1915, is entitled to one month's additional wages and other relief provided for by Revised Statutes, Section 4583.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 10–13.

STATEMENT

The District Court made no special findings of fact. The facts appearing from the opinion of the District Court (R. 142–150), supplemented as far as necessary by references to undisputed testimony, are as follows:

The petitioner was hired as a fireman on the vessel "American Shipper" on or about February 15, 1928, on a voyage from New York to London and return, at wages of sixty-five dollars a month (R. 142). At that time the United States was the owner of the "American Shipper" (R. 16–17).

When the ship arrived in London, the petitioner demanded his discharge from the vessel, the payment of the balance of wages standing to his credit, one month's additional pay, and that he be provided with adequate employment on board some other vessel back to New York (R. 142). In support of his demand the petitioner quoted the titles of Section 2 of the Seamen's Act, and Revised Statutes, Section 4583 (R. 142). The petitioner made his demand while the master was advancing money to members of the crew who were about to take shore leave (R. 148). At that time the master declined to comply with the requests of the petitioner, but asked the petitioner to meet him the next afternoon at the American Consulate (R. 148).

On the morning following the request made to the master, the petitioner presented his demand orally at the American Consulate (R. 148). The petitioner left the Consulate before the master arrived (R. 148). On the next day the petitioner departed the ship without seeing the master, although that officer testified to his presence on board each and every day the ship was in port (R. 148). On the day after his abandonment of the ship, the petitioner's written complaint was received at the Consulate, as had been requested (R. 148). A Vice-Consul thereupon wrote to the petitioner that he was not entitled to discharge (R. 148). The letter was addressed to the petitioner at the ship, the only address of which the Vice-Consul had knowledge (R. 148). Since the petitioner had already left the

vessel, he never received the letter (R. 148). The petitioner remained about three weeks in England visiting relatives by marriage (R. 29), and then returned to New York at his own expense (R. 23). The libel in this suit was filed July 11, 1928 (R. 1).

On the voyage from New York to London above mentioned, the thirteen seamen on the vessel were not as equally divided into watches as that number permitted (R. 143). Three seamen were placed on each of the three watches, and four men were used for day duty and were not on any watch (R. 143). Three oilers were not placed on any watch, but were assigned to day duty (R. 143). The firemen and water tenders were equally divided into three watches (R. 143).

When the petitioner left the ship in London, he asked the chief mate for a pass for his clothes (R. 22). The request being refused, the petitioner departed the ship without his clothes (R. 23).

The District Court originally entered a decree in favor of the petitioner in the sum of $6,456.83, with interest, representing wages due at the time the petitioner left the ship, damages for loss of clothes, and two days' pay for one from the date of the commencement of the suit to the date of the decree (R. 153–154). After rehearing the decree was modified to eliminate the double wages, and the amount of recovery was thus reduced to $132.82, with interest, including costs (R. 164–165). The Circuit Court of Appeals affirmed (R. 221).

ARGUMENT

I

The petitioner's libel in the District Court contained a claim for double wages during a period of delay in payment of wages, pursuant to Section 3 of the Seaman's Act of March 4, 1915, *infra*, p. 11. It was alleged that respondent had been guilty of a violation of Section 2 of the Act (*infra*, p. 10), by the master's alleged failure to divide the seamen and oilers into equal watches. The court below held that the double wages provision created a penalty for which the United States had not consented to be sued. We submit that that conclusion is correct. But if a writ of certiorari should be granted, the respondent will further urge that there was no violation of the statute in question, that the refusal or neglect of the master to make payment of the wages demanded was not without sufficient cause, and still further, that libellant deserted his ship.

The court below relied chiefly upon the decision of this Court in *Missouri Pacific R.R. Co.* v. *Ault*, 256 U.S. 554. In that case there was presented the question whether the United States had assumed liability to continue payment of wages to a discharged railroad employee under an Arkansas statute requiring continued payment if wages due at the time of discharge were not promptly paid. When the Government took control and possession of the railroads during the war, Congress provided

that the carriers should "be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law", and that the "lawful police regulations of the several States" should remain unimpaired. Federal Control Act of March 21, 1918, c. 25, Sections 10, 15, 40 Stat. 451, 456, 458. This Court held that the provision for payment over and above the wages due was in the nature of a punishment, and said (pp. 563–564):

> Congress is not to be assumed to have adopted the method of fines paid out of public funds to insure obedience to the law on the part of the Government's railway employees.

We submit that the question presented in the *Ault* case is sufficiently close to the question in the case at bar to make the reasoning of that decision controlling. As pointed out by the court below, the penalty element is more pronounced here, where the statute calls for double wages during the period of delay. And we submit that the provisions of Section 2 of the Suits in Admiralty Act (*infra*, p. 12), allowing a libel *in personam* against the United States if a "proceeding in admiralty could be maintained" against a privately owned vessel, assumes no broader liability than the Federal Control Act involved in the *Ault* case. In this connection it is interesting to note the analogy drawn by this Court in the *Ault* case, where at page 560, speaking of

the conception of the transportation systems under the Federal Control Act, it said:

> The systems are regarded much as ships are regarded in admiralty. They are dealt with as active responsible parties answerable for their own wrongs. * * *

The petitioner has cited cases in which the double wages provision here involved has been considered as providing for compensation to seamen rather than imposing a penalty upon the ship owner. In none of those cases was the assumption of liability by the United States directly passed upon. In *Vincent* v. *United States*, 272 Fed. 889 (C.C.A. 9th), the United States was held liable, but there was no discussion of the question raised here. Decisions that a state court has jurisdiction of the action (*Cox* v. *Lykes Bros.*, 237 N.Y. 376), that the state statute of limitations governs (*Buckley* v. *Oceanic S.S. Co.*, 5 F. (2d) 545 (C.C.A. 9th)), or that the double wages are secured by a prior lien (*Gerber* v. *Spencer*, 278 Fed. 886 (C.C.A. 9th)), do not in our opinion control here. Other cases cited by the petitioner involved similar rulings. The distinction which we deem important was noted in *Cox* v. *Lykes Bros.*, *supra* (p. 380):

> We are to remember that the same provision may be penal as to the offender and remedial as to the sufferer. * * *

And this Court in considering the meaning and application of the words, "master or owner who re-

fuses or neglects to make payments * * * without sufficient cause", in the statute here involved, stated in *Collie* v. *Ferguson*, 281 U.S. 52, 55–56:

> We think the use of this language indicates a purpose to protect seamen from delayed payments of wages by the imposition of a liability which is not exclusively compensatory, but designed to prevent, by its coercive effect, arbitrary refusals to pay wages, and to induce prompt payment when payment is possible.

We submit that whatever activity the Government may undertake, it does not forfeit its immunity from suit otherwise than by specific consent. Consent to be liable for the double wages penalty here involved does not clearly appear and, in accordance with the principle expounded by this Court in *Missouri Pacific R.R. Co.* v. *Ault*, *supra*, may not be assumed.

The suggestion that the failure to plead the lack of consent to be sued prevented the imposition of that defense upon rehearing in the District Court is without merit. No suit can be maintained against the United States without express authority of Congress, and lack of consent to be sued may not be waived by a Government officer. *Stanley* v. *Schwalby*, 162 U.S. 255, 269–270.

II

The petitioner sued also for one month's wages over and above the wages due him at the time he left

the ship, and return passage, under Revised Statutes, Section 4583, *infra* p. 10. This demand was denied by the District Court on the ground that the relief given under Section 2 of the Seaman's Act for a violation thereof was exclusive (R. 145–147). See 35 Op. Atty. Gen. 292. The Circuit Court of Appeals denied the claim on the ground that the circumstances shown by the petitioner were not such as to make the statute applicable (R. 220–221). We submit that either ground is clearly sufficient to dispose of the petitioner's contention.

CONCLUSION

We submit that the decision below is correct, and that there is no conflict of decisions. The petition should therefore be denied.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

GEORGE C. SWEENEY,
Assistant Attorney General.

J. R. FILLMAN,
Attorney.

SEPTEMBER 1934.

APPENDIX

Section 4583 of the Revised Statutes as amended (U.S.C., Title 46, Sec. 685) provides:

> Whenever on the discharge of a seaman in a foreign country by a consular officer on his complaint that the voyage is continued contrary to agreement, or that the vessel is badly provisioned or unseaworthy, or against the officers for cruel treatment, it shall be the duty of the consul or consular agent to institute a proper inquiry into the matter, and, upon his being satisfied of the truth and justice of such complaint, he shall require the master to pay to such seaman one month's wages over and above the wages due at the time of discharge, and to provide him with adequate employment on board some other vessel, or provide him with a passage on board some other vessel bound to the port from which he was originally shipped, or to the most convenient port of entry in the United States, or to a port agreed to by the seaman.

The Seaman's Act of March 4, 1915, c. 153, 38 Stat. 1164, provides in part:

> SEC. 2. In all merchant vessels of the United States of more than one hundred tons gross, excepting those navigating rivers, harbors, bays, or sounds exclusively, the sailors shall, while at sea, be divided into at least two, and the firemen, oilers, and water tenders into at least three watches, which shall be kept on duty successively for the perform-

ance of ordinary work incident to the sailing and management of the vessel. The seamen shall not be shipped to work alternately in the fireroom and on deck, nor shall those shipped for deck duty be required to work in the fireroom, or vice versa; but these provisions shall not limit either the authority of the master or other officer or the obedience of the seamen when, in the judgment of the master or other officer, the whole or any part of the crew are needed for the maneuvering of the vessel or the performance of work necessary for the safety of the vessel or her cargo, or for the saving of life aboard other vessels in jeopardy, or when in port or at sea from requiring the whole or any part of the crew to participate in the performance of fire, lifeboat, and other drills. While such vessel is in a safe harbor no seaman shall be required to do any unnecessary work on Sundays or the following-named days: New Year's Day, the Fourth of July, Labor Day, Thanksgiving Day, and Christmas Day, but this shall not prevent the dispatch of a vessel on regular schedule or when ready to proceed on her voyage. And at all times while such vessel is in a safe harbor, nine hours, inclusive of the anchor watch, shall constitute a day's work. Whenever the master of any vessel shall fail to comply with this section, the seamen shall be entitled to discharge from such vessel and to receive the wages earned. But this section shall not apply to fishing or whaling vessels, or yachts.

(U.S.C., Title 46, Sec. 673.)

SEC. 3. The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and

in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage.

(U.S.C., Title 46, Sec. 596.)

The Suits in Admirality Act of March 9, 1920, c. 95, Sec. 2, 41 Stat. 525 (U.S.C., Title 46, Sec. 742), provides:

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the

United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

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